Board of Alien Labor Certification
United States Department of Labor
Washington, D.C.

'Notice: This is an electronic bench opinion which has not been verified as official'

DATE: July 2, 1997
CASE NO:96-INA-058

In the Matter of:

KING YUM CHINESE
Employer

On Behalf of:

THEAN WAI CHONG
Alien

Appearance: Fayek I. Awad
Allentown, PA
For the Employer and Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the employer's request for review pursuant to 20 C.F.R. 656.26 (1991) of the denial by the United States Department of Labor Certifying Officer("CO") of alien labor certification. This application was submitted by employer on behalf of the above-named alien pursuant to §212 (a) (5) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182 (a) (5) ("Act"). The certification of aliens for permanent employment is governed by § 212 (a) (5) (A) of the Act, 8 U.S.C. §1182 (a) (5) (A), and Title 20, Part 656 of the Code of Federal Regulations ("CFR"). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212 (a) (5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United

States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

We base our decision on the record upon which the CO denied certification and employer's request for review, as contained in the Appeal File,[1] and any written argument of the parties. § 656.27(c).

Statement of the Case

On October 12, 1993, King Yum Chinese ("employer") filed an application for labor certification to enable Thean Wai Chong ("alien") to fill the position of Chief Cook/Assistant Manager at a weekly wage of $ 540.00 (AF 33). The job duties are described as follows:

> 1. As Chief Cook: In charge of the kitchen work. Four Cooks work under his supervision in the kitchen; 2. As Assistant Manager: In charge of all records for buying vegetables, fruits and meat; records of bookkeeping and other work with regard to Restaurant accounting and relieve the Manager during vacation. In this capacity he supervises also nine waitresses. 3. Make new orders of raw food and in charge of Store Inventory [sic] (AF 33).

The job requirements are two years of experience in the job offered or two years of experience in a related occupation. Other special requirements are stated as "speaks Mandarin, Cantonese, Malaysian, and some English. Experience in Chinese Food and Delicacies" (AF 33).

On April 7, 1995, the CO issued a Notice of Findings proposing to deny the labor certification. The CO found that the employer violated § 656.21 (b) (2) (i) (A) (B) which provides that the employer shall document that the job opportunity has been and is being described without unduly restrictive job requirements. The job opportunity's requirements, unless adequately documented as arising from business necessity, shall be those normally required for the job in the United States; and be defined in the Dictionary of Occupational Titles (DOT). Specifically, the CO objected to the employer's requirement that all candidates possess the ability to speak Mandarin, Cantonese, and Malaysian. The CO therefore requested the employer to: (1) delete or alter the requirements and readvertise, or (2) demonstrate that the requirement is customary or normal for the position in the United States (AF 63). The CO also cited a violation of § 656.24 (b) (2) (ii) which provides that a U.S. worker shall be considered able and qualified for the job opportunity if the worker, by education, training, experience, or a combination thereof, is able to perform in the normally acceptable manner the duties involved in the occupation as performed by workers similarly employed. Furthermore, §656.21 (b) (6) provides that U.S. workers applying for a job opportunity offered to an alien may be rejected solely for lawful, job-related reasons. The CO disputed the employer's rejection of Bu-Kan Chu who has 15 years of experience as a Chinese food chef. The CO therefore requested that the employer demonstrate

[1] All further references to documents contained in the Appeal File will be noted as "AF."

lawful, job related reasons for rejecting this applicant (AF 61).

In rebuttal, dated April 28, 1994, the employer argued that the language requirements arise out of business necessity. The employer contended that communication is an important factor in its business as many of the customers speak Mandarin, Cantonese, and Malay (AF68). The employer estimated that approximately 60 percent of the incumbent's time will be devoted to communicating with customers. The employer also argued that Applicant Bu-Kan Chu was unqualified because he was unable to communicate proficiently in English, and he was unfamiliar with the management duties of bookkeeping and inventory (AF 67).

The CO issued the Final Determination on May 26, 1995 denying the labor certification. The CO reiterated the reasons listed in the NOF and found that the employer failed to adequately rebut the NOF issues. The CO concluded that the employer did not demonstrate why a Chief Cook would need to be able to communicate in the three foreign languages in order to perform the job duties. The CO also continued to dispute the employer's rejection of Mr. Chu. In a questionnaire from the state employment agency, Mr. Chu indicated that in the past he operated his own restaurant where he was responsible for all of the bookkeeping and inventory duties. Mr. Chu also stated that the employer, during the interview, never suggested that he was not qualified for the position (AF 70). On June 30, 1995, the employer requested review of Denial of Labor Certification pursuant to § 656.26 (b) (1) (AF 108).

Discussion

The issues presented by this appeal are whether the foreign language requirements are unduly restrictive; and whether the employer provides lawful, job-related reasons for rejecting Applicant Chu.

Section 656.21 (b) (2) proscribes the use of unduly restrictive job requirements in the recruitment process. The reason unduly restrictive requirements are prohibited is that they have a chilling effect on the number of U.S. workers who may apply for or qualify for the job opportunity. The purpose of § 656.21 (b) (2) is to make the job opportunity available to qualified U.S. workers. *Venture International Associates, Ltd.*, 87-INA-569 (Jan. 13, 1989) (*en banc*). Section 656.21 (b) (2) (I) (C) provides that the job opportunity shall not include a requirement for a language other than English unless that requirement is documented as arising from business necessity. The business necessity standard of *Information Industries*, 88-INA-82 (Feb. 9, 1989) (*en banc*) is applicable to a foreign language requirement. As this standard has developed in relation to foreign language requirements, the first prong generally examines whether the employer's business includes clients, co-workers or contractors who speak a foreign language, and what percentage of the employer's business involves this foreign language. The second prong generally focuses on whether the employee's job duties require communicating or reading in a foreign language.

The employer estimated that approximately 75% of its customers speak Mandarin,

Cantonese, or Malay, while the remaining 25% speak English (AF 68). The employer also reported that 60% of the employee's time will be spent communicating with the customers. The employer thus maintained that the first prong of the *Information Industries* standard was met because the foreign language requirements bear a reasonable relationship to the occupation in the context of the employer's business. However, on the application for certification, the CO specified the occupational title as Executive Chef. *See Dictionary of Occupational Titles, Occ. Code 187.161-010.* The employer never objected to this classification. We find the employer's position to be anomalous as there is no evidence in the record that demonstrates that a foreign language bears a reasonable relationship to the chef's duties. Moreover, the employer provides no evidence which shows that the foreign language requirements are essential to the performance of the job. *See International Student Exchange of Iowa, Inc.*, 89-INA-261 (Apr. 30, 1991), *aff'd*, 89-INA-261 (Apr. 21, 1992) (*en banc*) (foreign language is essential when the employer shows there is a frequent and constant need to communicate in the foreign language in business transactions). To the contrary, we think a chef may be highly qualified even though he speaks no foreign language at all. For these reasons, we find that certification properly was denied. Because the employer failed to establish the business necessity of the foreign language requirements, certification cannot be granted and further examination of the other reasons cited by the CO is unnecessary.

ORDER

The Certifying Officer's denial of labor certification is hereby AFFIRMED.

For the Panel:

JOHN C. HOLMES
Administrative Law Judge

NOTICE FOR PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and,**(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office Of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced type-written pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced type-written pages. Upon the granting of a petition, the Board may order briefs.